Supreme Court, U.S.
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In The

Supreme Court of the United States

TIMOTHY K. DUNAWAY,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI FOR PETITIONER, TIMOTHY K. DUNAWAY

IRVING J. WARSHAUER,
La Bar #13252
GAINSBURGH, BENJAMIN, DAVID,
WARSHAUER & MEUNIER
1100 Poydras Street, Suite 2800
New Orleans, LA 70163
(504) 522-2304

Counsel of Record for Petitioner

58 pp

QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

I. DID THE FIFTH CIRCUIT COURT OF APPEALS ERR IN CONCLUDING THAT THE FAILURE BY THE UNITED STATES ARMY CORPS OF ENGINEERS TO REPORT, WARN OF, MARK, OR REMOVE A SAND-BAR HAZARDOUS TO NAVIGATION WAS SUSCEPTIBLE TO POLICY ANALYSIS AND THEREFORE PROTECTED BY THE DISCRETIONARY FUNCTION EXCEPTION, A DECISION THAT CONFLICTS WITH JURISPRUDENCE IN THE SEVENTH, EIGHTH, NINTH, AND D.C. CIRCUIT COURTS OF APPEAL?

II. DID THE DISTRICT COURT ERR IN APPLYING THE DISCRETIONARY FUNCTION EXCEPTION IN LIGHT OF THE MANDATORY DIRECTIVES SET FORTH IN 33 C.F.R. §245.10?

LIST OF ALL PARTIES

The following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Michelle T. Delemarre
United States Department of Justice
Torts Branch, Civil Division
P. O. Box 14271
Washington, D.C. 20044-4271
(202) 616-4037

G. Rogers Sloan
Office of Counsel
U.S. Army Corp of Engineers
4155 Clay Street
Vicksburg, MS 39183-3435
(601) 631-5075

Attorneys for United States of America

Craig J. Robichaux
Talley, Anthony, Hughes & Knight, L.L.C.
4564 Lasalle Street, Suite 300
Mandeville, LA 70471
(504) 624-5010
Attorneys for Rodney J. Strain, Jr., in his official capacity as Sheriff of St. Tammany Parish

There are no corporations involved in this action; therefore, a corporate disclosure statement is unnecessary.

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OPINIONS BELOW

On September 2, 1999, the Honorable Sarah S. Vance, United States District Judge, granted the United States' Motion for Summary Judgment. (*See* Appendix "2".) On March 28, 2001, the United States Court of Appeals for the Fifth Circuit affirmed Judge Vance's ruling. (*See* Appendix "1".) On June 5, 2001, the United States Court of Appeals for the Fifth Circuit denied Timothy Dunaway's petition for rehearing. (*See* Appendix "3".)

STATEMENT OF BASIS FOR JURISDICTION

The United States District Court for the Eastern District of Louisiana had jurisdiction over this action pursuant to 28 U.S.C. §1333(1). The United States Court of Appeals for the Fifth Circuit had jurisdiction of this matter pursuant to 28 U.S.C. §1292(a)(3), which provides jurisdiction over appeals from "interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed." Timothy Dunaway, plaintiff, asserts his claims against defendant, United States of America, pursuant to the Suits in Admiralty Act, 46 U.S.C. App. §741, *et seq.* and, thus, is a party to an admiralty case.

CONSTITUTIONAL AND STATUTORY PROVISIONS

33 C.F.R. 245.10

§§ 245.10 General policy.

(a) Coordination with Coast Guard. The Corps of Engineers coördinates its wreck removal program with the Coast Guard through interagency agreement, to insure a coordinated approach to the protection of federal interests in navigation and safety. Disagreements at the field level are resolved by referral to higher authority within each agency, ultimately (within the Corps of Engineers) to the Director of Civil Works, who retains the final authority to make independent determinations where Corps responsibilities and activities are affected.

(b) Owner responsibility. Primary responsibility for removal of wrecks or other obstructions lies with the owner, lessee, or operator. Where an obstruction presents a hazard to navigation which warrants removal, the District Engineer will attempt to identify the owner or other responsible party and vigorously pursue removal by that party before undertaking Corps removal.

(c) Emergency authority. Obstructions which impede or stop navigation; or pose an immediate and significant threat to life, property, or a structure that facilitates navigation; may be removed by the Corps of Engineers under the emergency authority of section 20 of the Rivers and Harbors Act of 1899, as amended.

(d) Non-emergency situations. In other than emergency situations, all reported obstructions will be evaluated jointly by the District Engineer and the Coast Guard

district for impact on safe navigation and for determination of a course of action, which may include the need for removal. Obstructions which are not a hazard to general navigation will not be removed by the Corps of Engineers.

(e) Corps removal. Where removal is warranted and the responsible party cannot be identified or does not pursue removal diligently, the District Engineer may pursue removal by the Corps of Engineers under section 19 of the Rivers and Harbors Act of 1899, as amended, following procedures outlined in this C.F.R. part.

STATEMENT OF FACTS

On April 12, 1998, the plaintiff, Timothy Dunaway, was operating his motor boat between locks one and two on the Pearl River Navigational Canal, a navigable waterway in St. Tammany Parish, Louisiana, that is owned, operated, managed, controlled, and maintained by the United States Army Corps of Engineers. While traveling at approximately fifteen miles per hour, in the middle of the canal, plaintiff's boat struck a submerged and concealed sandbar. As a result, Mr. Dunaway's face was forcefully and violently propelled into the boat's aluminum windshield frame. Due to the impact, Mr. Dunaway suffered severe and numerous facial and nasal fractures. Plaintiff's injuries initially required emergency major reconstructive surgery. Extensive medical treatment and hospital care followed, including six subsequent operations necessary to rebuild his face and to combat the serious infections that he contracted.

Following the allision, Mr. Dunaway filed suit against the United States, and others, asserting that the Corps of Engineers (hereinafter "Corps") could have prevented this casualty. As owner of the waterway, the Corps, primarily through its employee, Kenneth Parker, failed to warn of, mark, or remove the dangerous and submerged sandbar, the existence of which was known to the Corps, but hidden from Mr. Dunaway and other boaters. The area between locks one and two in the Pearl River Navigational Canal was managed by Kenneth Parker, the Corps' lock and dam operator on that waterway. Mr. Parker's job required that he undertake several major duties and responsibilities, all of which were enumerated in his official job description. Pertinent sections of Mr. Parker's job description required him to perform safety functions, including patrolling the waterway to determine maintenance requirements, posting and maintaining navigational signs, and relaying information on river conditions to recreational boaters.

The Corps filed a Motion for Summary Judgment, seeking to escape responsibility for the incident under the discretionary function exception. The district court granted the United States' motion, ruling that the actions and/or inactions of the Corps were discretionary in nature and subject to policy considerations and, therefore, protected by the discretionary function exception. This ruling was affirmed by the United States Court of Appeals for the Fifth Circuit.

The rulings of the district court and the United States Fifth Circuit Court of Appeals contradict rulings from the Seventh, Eighth, Ninth, and D.C. Circuit Courts of Appeals on cases with similar facts, and even conflicts

with an earlier decision from the Fifth Circuit Court of Appeals. The motion for summary judgment filed by the United States should have been dismissed because the Corps had a nondiscretionary duty to warn of the submerged sandbar because it involved safety considerations. The Corps' conduct was not of the kind that the discretionary function exception was designed to shield.

In addition, a federal statute, 33 C.F.R. §245.10, required that the Corps evaluate the sandbar to determine its impact on navigation, thus making the Corps' actions nondiscretionary.

Accordingly, the ruling of the district court granting the United States' Motion for Summary Judgment and the affirmation of this ruling by the United States Fifth Circuit Court of Appeals should be reversed, and this case should be remanded to the district court for trial on the merits. The basis of federal jurisdiction in the first instance is 28 U.S.C. §1333(1).

ARGUMENT

I. THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT IN CONCLUDING THAT IN A FAILURE BY THE UNITED STATES ARMY CORPS OF ENGINEERS TO REPORT, WARN OF, MARK, OR REMOVE A SANDBAR WAS SUSCEPTIBLE TO POLICY ANALYSIS AND THEREFORE PROTECTED BY THE DISCRETIONARY FUNCTION EXCEPTION, SINCE THIS DECISION CONFLICTS WITH JURISPRUDENCE IN THE SEVENTH, EIGHTH, NINTH, AND D.C. CIRCUIT COURTS OF APPEAL.

A. Discretionary Function Exception

The discretionary function exception upon which the Corps relied is part of the Federal Tort Claims Act (hereinafter "FTCA").[1] The broad purpose of the FTCA is to compensate victims of the negligent conduct of governmental agencies in circumstances like those in which a private person would be liable.[2] In the instant case, suit was brought against the Corps under the Suits in Admiralty Act[3] (hereinafter "SAA"). Mr. Dunaway contends that the Corps, primarily through its employee, Kenneth Parker, was negligent for failing to mark, warn of, or remove the sandbar that caused his injuries.

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[1] 28 U.S.C. §2680.

[2] *Indian Towing Company, Inc. v. United States*, 350 U.S. 61, 76 S.Ct. 122, 126 (1953).

[3] 46 U.S.C. §741 *et seq.*

It is well-settled law that the duty owed by the Corps in claims brought under the SAA is equal to that of a private person in like circumstances[4] and that this standard requires the use of due care.[5] To determine whether the Corps is entitled to escape its liability under the SAA as a result of the discretionary function exception, a two-part test is applied. First, the court must decide whether the challenged conduct involves an element of judgment or choice . . . *i.e.*, is the conduct in question "discretionary" conduct?[6] Second, if the conduct is determined to be discretionary, the court must decide whether the conduct is of the kind that the discretionary function exception is designed to shield.[7] This two part test was set forth in *Burkovitz v. United States*[8] and is commonly referred to as the "*Burkovitz* analysis."

To determine if the conduct is discretionary, the relevant inquiry is whether a controlling statute or regulation mandates that a government agent perform his function in a specific manner.[9] In the case at bar, the Corps' conduct was regulated by its employee's job description and by statute. Since there was no element of judgment or choice, the Corps' conduct was not discretionary. Consequently, the discretionary function exception does not

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[4] *Transorient Navigators Co. S.A. v. U.S. Army Corps of Engineers*, 714 F.2d 1358 (5th Cir. 1983).

[5] *Id.*

[6] *Powers v. United States*, 996 F.2d 1121, 1124 (11th Cir. 1993).

[7] *Hughes v. United States*, 110 F.3d 765 (11th Cir. 1997).

[8] *Burkovitz v. United States*, 486 U.S. 531, 108 S. Ct. 1454 (1959).

[9] *Powers*, 996 F.2d at 1125.

apply. The district court erred in ruling that the Corps' job description for its employee and the statutes governing his conduct did not mandate a course of conduct for him to follow.

Assuming, *arguendo*, that Mr. Parker's conduct was discretionary, the United States failed to satisfy the second part of the analysis because Mr. Parker's conduct was not of the kind that the discretionary function was designed to shield. In fact, the Corps had a nondiscretionary duty to warn of the submerged sandbar because it was a concealed hazard to navigation and, thus, involved considerations of safety. The district court erred in holding that the failure of the Corps to warn of, mark, or report the sandbar was susceptible to policy analysis and, therefore, protected by the discretionary function exception. The United States Fifth Circuit Court of Appeals' affirmance of the ruling of the trial court conflicts with earlier decisions by the Seventh, Eighth, Ninth, and D.C. Circuit Courts of Appeals.

The second prong of the *Burkovitz* test requires that a determination be made whether discretionary actions are shielded by the exception. The exception "protects only governmental actions and decisions based on considerations of public policy."[10] In general, safety-related governmental decisions that are not motivated by policy considerations do not fall within the discretionary function exception.[11] In those cases where the court determines that a danger was known to federal employees but

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[10] *Burkovitz*, 486 U.S. 531, 537, 108 S.Ct. 1954 (1959).

[11] *Sumners v. U.S.*, 905 F.2d 1212, 1215-16 (9th Cir. 1990).

hidden from the public, the government has a nondiscretionary duty to warn.

For example, in *Faber v. The United States*,[12] the plaintiff was injured when he dove off a cliff and struck his head on rocks. The Ninth Circuit Court of Appeals held that the discretionary function exception was not applicable, basing much of its decision on the fact that the Forest Service, prior to the accident, had promulgated a management plan, which mandated new warning signs.[13] The Forest Service failed to post any new warning signs and, therefore, the court found that the government failed to meet the first part of the discretionary function analysis. The court further reasoned that the question of what constituted adequate warning is not typically related to broad public policy, but rather involves considerations of safety.[14] The *Faber* Court stated:

> It would be wrong to apply the discretionary function exception in a case where a low level government employee made a judgment not to post a warning sign, or to erect a guardrail, or to make a safer path. Such a judgment would be no different than a judgment made by a private individual not to take certain measures to ensure the safety of visitors. To interpret such a judgment as discretionary would be too expansive an interpretation of Congress' intent in creating the discretionary function exception. Therefore, in cases where the government has

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[12] 56 F.3d 1122 (9th Cir. 1995).

[13] *Id.*

[14] *Id.*

> allegedly failed to warn, the use of the discretionary function exception must be limited to those unusual situations where the government was required to engage in broad, policy making activities or to consider unique, social, economic and political circumstances in the course of making judgments related to safety.[15]

The Ninth Circuit Court of Appeals concluded that the case involved a question of whether the Forest Service was negligent in ensuring the safety of the public in an area under the Forest Service's control. The actions that the Forest Service was required to take in the course of implementing proper warnings at the site of the injury were not broad policy based decisions that warranted protection pursuant to the discretionary function exception. The court also concluded that no unusual circumstances existed which required the Forest Service to engage in policymaking or discretionary activities. In the case at bar, Mr. Parker's decision not to post a warning sign was no different from a judgment made by a private individual not to take certain measures to ensure the safety of visitors. No evidence exists showing a broad based policy decision which warrants protection pursuant to the exception.

Similarly, in *Cope v. Scott*,[16] the plaintiff alleged the National Park Service's negligent maintenance of a roadway and its failure to warn of danger. The plaintiff was injured when a car traveling in the opposite direction

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[15] *Faber*, 56 F.3d at 1125.

[16] 45 F.3d 445 (D.C. Cir. 1995).

crashed into the plaintiff's car on a rainy day. The accident occurred because the road's surface was paved with materials that became nonskid resistant in wet weather. The D.C. Circuit Court of Appeals held that the discretionary function exception was applicable to bar responsibility for negligent road maintenance.[17] The exception, however, was inapplicable with respect to where and how to post signs and to warn of dangerous road conditions.[18] The court found that the posting of signs involved the exercise of discretion, but that the discretion was not the kind protected by the exception.[19] The exception did not apply because the Park Service had already made a policy judgment to manage the road as a commuter road and had posted many other safety-related signs. "Having taken steps to warn users of dangers inherent in that use, the park service cannot argue that its failure to ensure that those steps are effective involves protected "discretionary decisions."[20] Thus, the plaintiff was allowed to proceed in his efforts to prove that the government was negligent in its choice and placement of warnings.

In *Chapman v. United States*,[21] the government was held liable for a wrongful death caused by its failure to warn of a submerged dam in the Kankakee River that

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[17] *Id.*

[18] *Id.*

[19] *Id.* at 451.

[20] *Id.*

[21] 541 F.2d 641 (7th Cir. 1976), *rev'd on jurisdictional grounds*, 575 F.2d 147 (1976).

constituted a hazard to navigation. In rejecting an argument that the government owed no duty to mark the dam, the Seventh Circuit stated:

> Now that the Kankakee at the point of the dam has become a resort for fishermen, picnickers, sailors, bathers, water skiers and sightseers, which from a safety standpoint requires even greater supervision, the United States has, ex parte, renounced the supervision it had claimed for a century and has not only permitted the dam to deteriorate into a number one water hazard, but has not even placed warning signs to alert the public to the danger that it has helped to create. This seems to us both untenable and unseemly.[22]

Likewise, in *Seyler v. The United States*,[23] a motorcyclist injured on an Indian reservation's roadway brought an action against the federal government. The government moved for summary judgment, which was granted by the district court. The Ninth Circuit Court of Appeals held that the discretionary function exception did not encompass the alleged negligence of the federal government in failing to erect speed limit signs on a reservation's roadway.[24] The court stated: "Moreover, we doubt that any decision not to provide adequate signs would be of the nature and quality that Congress intended to shield from tort liability."[25] In the instant case, the Corps alleges that it had a policy of not marking sandbars. Yet, Dennis

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[22] 541 F.2d at 646.

[23] *Seyler*, 832 F.2d 120 (9th Cir. 1987).

[24] *Id.*

[25] 832 F.2d at 123.

Norris, the district manager for the Corps, admits that there is no such written policy.[26] Even if it is assumed that the Corps did have an informal unwritten policy of not marking sandbars, any decision not to provide some warning of a concealed sandbar that constituted a hazard to navigation is not a decision Congress intended to shield from tort liability.

In *Sutton v. Earleas*,[27] the survivors and representatives of victims of an allision between a pleasure boat and a navy mooring buoy brought an action against the United States under the Suits in Admiralty Act. The Ninth Circuit Court of Appeals held that the discretionary function exception did not protect the government from liability for its negligent failure to warn of an obstruction to navigation.[28] In *Sutton*, the Navy had placed a partially submerged obstruction to navigation in waters through which private boaters regularly passed. The court held that the Navy's failure to post a speed limit sign thereafter was more than a failure to enforce a general system of regulations; it was a failure to warn.[29] The court further stated that "in light of the hazard in the water, the Navy's failure to post the speed limit adequately is not protected by the discretionary function exception because the omission was not that grounded in

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[26] *See* Exhibit 10 – Deposition of Dennis Norris, p. 121, ln. 21-25; p. 122, ln. 1-2; Appellate Record, Vol. 2, pp. 323, 324.)

[27] 26 F.3d 903 (9th Cir. 1993).

[28] *Id.*

[29] *Id.*

social, economic or political policy."[30] The Ninth Circuit continued:

> A decision not to warn of a specific, known hazard for which the acting agency is responsible is not the kind of broader, social, economic or political policy decision that the discretionary function exception is intended to protect. We so held in *Sumners v. United States*.[31] In *Sumners*, the national park service had instituted a policy of requiring fires to be in designated fire rings on a beach. We held that the park services' failure to warn the public of the danger of hot coals to bare feet in the area of the fire rings was not protected by the discretionary function exception. The district court's ruling here, that the Navy failed to post speed limit signs that would make the public aware of the need to proceed slowly in the area of the buoys is comparable.[32]

In addition to conflicting with the decisions of the Seventh, Eighth, Ninth, and D.C. Circuit Courts of Appeals, the decision in this case conflicts with an earlier ruling in the United States Fifth Circuit Court of Appeals. In *Wysinger v. United States*,[33] the plaintiff drowned while swimming at a site operated by the United States Forest Service. The plaintiff sought to hold the United States liable because no lifeguard was present at site. The Forest Service had posted warning signs, however, concerning swimming at one's own risk. The Fifth Circuit Court of

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[30] 26 F.3d at 910.

[31] 905 F.2d 1212 (9th Cir. 1990).

[32] *Id.*

[33] 784 F.2d 1252 (5th Cir. 1986).

Appeals held that the decision not to employ a lifeguard was within the discretionary function exception, but, if the government had negligently failed to warn of dangers at the swimming site, there was jurisdiction under the Federal Tort Claims Act and potential for recovery.[34]

B. The *Burkovitz* analysis as applied to the facts of this case.

In the case at bar, the submerged sandbar clearly presented a navigational hazard to Mr. Dunaway and the boating public. The Pearl River Navigational Canal was designed as an eighty-foot wide, seven-foot deep channel[35] that had been continuously open to navigation for recreational vessels and pleasure craft for at least the twenty years Mr. Parker worked on the canal.[36] At the time of Mr. Dunaway's accident, the sandbar was submerged approximately a foot and a half below the water and stretched the entire width of the canal.[37] On weekends, as many as fifty to sixty recreational boats used the area between locks 1 and 2, where the casualty occurred, to ski, fish and pleasure cruise.[38]

In the opinion of Deputy Richard Singletary of the St. Tammany Parish Sheriff's Office, who regularly patrolled

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[34] 784 F.2d at 1254.

[35] *See* Exhibit 3 – deposition of Kenneth Parker, p. 18, ln. 17-25 and p. 19, ln. 1-2. (Appellate Record, Vol. 2, pp. 270, 271).

[36] *See* Exhibit 3 – deposition of Kenneth Parker, p. 12, ln. 5-9. (Appellate Record, Vol. 2, p. 269).

[37] *See* Exhibit 3 – deposition of Kenneth Parker, p. 35, ln. 24-25, p. 36, ln. 1-9. (Appellate Record, Vol. 2, pp. 272, 273).

[38] *See* Exhibit 4 – deposition of Richard Singletary, p. 14, ln. 7-21. (Appellate Record, Vol. 2, p. 286).

the Pearl River Navigational Canal and who was assigned to Marine Enforcement and Search and Rescue, the sandbar was dangerous to the boating public.[39] Agent Charles Strain, of the Louisiana Department of Wildlife and Fisheries, Law Enforcement Division, agreed that the sandbar was dangerous and should have been marked.[40] Agent Strain investigated this accident and concluded that Mr. Dunaway could not have avoided the sandbar before the collision because it was not marked.[41] He further concluded that the sole cause of the accident was "hazardous water."[42]

Moreover, the underwater hazard caused two other violent groundings prior to Mr. Dunaway's accident. Michael McGoey's boat hit the sandbar, knocking him unconscious and killing the dog riding in his boat.[43] On the day before Mr. Dunaway's accident, Yvette Penton's boat struck the sandbar, resulting in a knee injury to her passenger.[44]

Kenneth Parker knew of the dangerous sandbar before Mr. Dunaway's accident. On March 1, 1998, six

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[39] *See* Exhibit 4 – deposition of Richard Singletary, p. 29, ln. 5-17. (Appellate Record, Vol 2., p. 287).

[40] *See* Exhibit 5 – deposition of Charles Strain, pp. 27-29. (Appellate Record, Vol. 2, pp. 293-295).

[41] *See* Exhibit 6 – boating accident report prepared by Charles Strain. (Appellate Record, Vol. 2, pp. 298-308).

[42] *See* Exhibit 5 – deposition of Charles Strain, p. 27, ln. 10-25; p. 37, ln. 5-17. (Appellate Record, Vol. 2, pp. 293, 296).

[43] *See* Exhibit 7 – deposition of Timothy Dunaway, p. 46, ln. 15 through p. 48, ln. 19. (Appellate Record, Vol. 2, pp. 311-313).

[44] *Id.*

weeks prior to Mr. Dunaway's accident, Deputy Richard Singletary informed Kenneth Parker of the sandbar and asked him what the Corps intended to do to rectify the dangerous situation. Deputy Singletary's conversation with Mr. Parker is memorialized in a written entry in his date book from March 1, which states, "talked with Kenny Parker about sandbar."[45] In addition, after Mr. Dunaway was injured, Kenneth Parker admitted to him that he had been aware of the sandbar prior to Dunaway's collision and that it had been logged.[46]

In his deposition, however, Mr. Parker denied prior knowledge of the sandbar and he maintained that Mr. Dunaway's accident was his first notice of the sandbar. This discrepancy between Mr. Parker's testimony and the testimony of Deputy Singletary and Mr. Dunaway creates a question of material fact which precludes summary judgment.

Certainly the sandbar, which Mr. Dunaway contends was known to Mr. Parker and the Corps but hidden under the water from mariners, presented a serious danger to the boating public. As such, the Corps, through Mr. Parker, had a nondiscretionary duty to warn of this hazard. To do nothing, before Mr. Dunaway and two other mariners collided with the sandbar, was not the type of negligence Congress intended to shield from liability via the discretionary function exception. Mr. Parker's ordinary negligence in failing to take some action to warn

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[45] *See* Exhibit 4 – deposition of Richard Singletary, p. 39, ln. 25 through p. 41, ln. 4. (Appellate Record, Vol. 2, pp. 288-290).

[46] *See* Exhibit 7 – deposition of Timothy Dunaway, p. 154, ln. 3-6. (Appellate Record, Vol. 2, p. 314).

should not be equated with broad social, economic, or political policy. No evidence was presented by the government to establish otherwise. The decisions in *Cope, Chapman, Faber, Sutton, Seyler* and *Wysinger* demonstrate that the government has a nondiscretionary duty to warn of a hidden danger, from which the discretionary function exception offers no relief. As such, the district court's holding – that the failure of the Corps to warn of, mark, or remove the sandbar was susceptible to policy analysis – was clearly wrong and should be reversed. The Fifth Circuit's affirmance of the district court decision was error, given the decisions from the Seventh, Eighth, Ninth, and D.C. Circuit Courts of Appeals. In addition, the Fifth Circuit's decision in this case conflicts with its earlier holding of *Wysinger v. United States;* and therefore it should be reversed.

II. THE DISTRICT COURT ERRED IN APPLYING THE DISCRETIONARY FUNCTION EXCEPTION IN LIGHT OF THE MANDATORY DIRECTIVES SET FORTH IN 33 C.F.R. §245.10.

The dangerous sandbar with which Mr. Dunaway's boat collided is an obstruction that is hazardous to navigation, as defined in 33 C.F.R. §245.5, which states:

> *Hazard to navigation* – an obstruction, usually sunken, that presents sufficient danger to navigation so as to require expeditious, affirmative action such as marking, removal, or redefinition of a waterway to provide for navigational safety.

> *Obstruction* – anything that restricts, endangers or interferes with navigation.[47]

The Corps has emergency authority to remove an obstruction that poses an immediate and significant threat to life or property.[48] Obstructions which impede navigation or impose an immediate threat to life or property may be removed by the Corps under the emergency authority of section 20 of the Rivers and Harbor Act of 1899, as amended.[49] Moreover, according to section 245.10 of the Code of Federal Regulations, even in a nonemergency situation, the Corps, at a minimum, has a duty to evaluate an obstruction for impact on safe navigation and to determine a course of action, including removal:

> *Non-emergency situations* – in other than emergency situations, all reported obstructions ***will*** be evaluated jointly by the district engineer and the Coast Guard district for impact on safe navigation and for determination of a course of action, which may include the need for removal.[50]

Accordingly, upon receiving a report of an obstruction, the Corps is required to consult with the Coast Guard and to determine jointly whether an obstruction poses a hazard to navigation. Factors to be considered include: the location of the obstruction, navigational difficulty, depth of water over the obstruction, the type and

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[47] 33 C.F.R. §245.5.

[48] 33 C.F.R. §245.10(c).

[49] *Id.*

[50] 33 C.F.R. §245.10(d) (emphasis added).

density of commercial and recreational traffic and history of vessel accidents due to the obstruction.[51] Once a hazard to navigation has been determined, the Corps must consider the appropriate action. Options include: charting, warning of, marking, or removing the obstruction. In addition, the Corps may decide to do nothing.[52]

In accordance with these statutes, the Corps should have removed the sandbar because it posed an immediate and significant threat to life and property. **At minimum, the Corps had a nondiscretionary duty to evaluate the sandbar to determine its impact on safe navigation.** The sandbar was clearly a hazard to navigation because it stretched across almost the entire canal, was shallowly submerged, and was located in an area of dense recreational traffic.

The Corps did not follow the mandatory instructions codified in 33 C.F.R. §245.10(d) concerning evaluation of the hazard to navigation. The district court in granting the United States' motion, and the Fifth Circuit relied primarily on the decision of *Theriot v. United States of America*.[53] In *Theriot*, a recreational boater ran aground on a submerged sill that had been constructed by the Corps of Engineers. The sill which caused the accident was charted on authorized navigational charts for the area published by the National Oceanic and Atmospheric Administration. In addition, mariners were notified of the location of the submerged sill in two separate Coast

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[51] 33 C.F.R. §245.20.

[52] 33 C.F.R. §245.25.

[53] *Theriot*, 245 F.3d 388 (5th Cir. 2001).

Guard Notices to Mariners.[54] The navigational charts and two separate Notices to Mariners provided by the Coast Guard warned recreational boaters of the existence of the sills. The petitioners in *Theriot*, nonetheless, urged that these methods of warning were insufficient and that a physical marker should have been placed at the site. The court in *Theriot* concluded that the decision to warn mariners by navigational charts and Notices to Mariners, rather than by physically marking the site was within the discretionary function exception to the Suits in Admiralty Act. Therefore in *Theriot*, the Coast Guard properly evaluated the potential hazard to navigation and decided upon a course of action. The petitioners "second-guessed" the course of action chosen by the Coast Guard. The Fifth Circuit held that the Coast Guard's choice of warning method was discretionary and the government was therefore immune.

In this case, Mr. Dunaway is not "second-guessing" any decision by the Corps of Engineers because no decision was made by the Corps with respect to how to warn mariners of the dangerous submerged sandbar that caused Mr. Dunaway's collision. No evaluation of the method of warning was made because Kenneth Parker, an employee of the Corps, failed to report the existence of the hazard to navigation, so that the evaluation process could begin.

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[54] *Theriot* at p. 393.

According to 33 C.F.R. §245.10, the Corps at a minimum had a duty to evaluate the obstruction for its impact on safe navigation and to determine a course of action. The mandatory evaluation required by 33 C.F.R. §245.10 removes the element of "judgment or choice" because it is a federal statute which specifically prescribes a course of action for the Corps of Engineers to follow.[55] Furthermore, a judgment or decision must be grounded on consideration of social, economic, or public policy in order to be immune.[56]

CONCLUSION

Mr. Parker, the lock and dam operator at the Pearl River Navigational Canal had a non-discretionary duty to warn of the hidden danger of which he was aware, but was unknown to Mr. Dunaway, because the duty to warn in this situation involved considerations of safety and not broad public policy. Whether Mr. Parker had prior knowledge of the sandbar is a genuine issue of material fact which should have made summary judgment improper. The Corps had a policy and a duty to provide recreational boaters on the Pearl River Navigational Canal with safe waters on which to travel. This policy is codified in 33 C.F.R. §245.10. This federal regulation mandates that the Corps, at a minimum, evaluate with the Coast Guard a

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[55] *Burkovitz v. United States*, 486 U.S. 531, 536, 108 S. Ct. 1954, 1958-1959, 100 L.Ed.2d 531 (1988).

[56] *Id.*

reported obstruction to determine its impact on safe navigation. The Corps failed to do so in this case. Accordingly, the discretionary function exception does not apply, and the district court's ruling, which was affirmed by the United States Fifth Circuit Court of Appeals, should be reversed, and this matter remanded to the trial court for further proceedings.

Respectfully submitted,

IRVING J. WARSHAUER,
La Bar #13252
GAINSBURGH, BENJAMIN, DAVID,
WARSHAUER & MEUNIER
1100 Poydras Street, Suite 2800
New Orleans, LA 70163
(504) 522-2304

Attorney for Petitioner,
Timothy Dunaway

APPENDIX

Appendix 1 – Ruling of the Fifth Circuit Court of Appeals dated March 28, 2001 .....App. 1

Appendix 2 – Ruling of United States District Court, Eastern District of Louisiana dated September 2, 1999 .....App. 3

Appendix 3 – Ruling of the Fifth Circuit Court of Appeals denying Timothy Dunaway's Petition for Rehearing dated June 5, 2001 .....App. 24

APPENDIX 1

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 99-31095

TIMOTHY K. DUNAWAY,

Plaintiff-Appellant,

VERUS

UNITED STATES OF AMERICA, ET AL.

Defendants,

UNITED STATES OF AMERICA,

Defendant-Appellee,

VERSUS

RODNEY STRAIN,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Louisiana
98-CV-2035-R

(Filed March 28, 2001)

Before REYNALDO G. GARZA, DAVIS and JONES, Circuit Judges.

DAVIS, Circuit Judge.*

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Timothy Dunaway filed this suit against the United States under the Suits in Admiralty Act, 46 U.S.C.A. § 741, et. seq., for injuries he sustained when his boat ran aground on a sandbar in the Pearl River Navigation Canal. The district court dismissed the suit on grounds that the U.S. had not waived sovereign immunity. The court rejected Dunaway's argument that immunity was waived because this claim fell within the discretionary function exception of the Federal Tort Claims Act.

Based on the reasoning of our unpublished opinion in *Theriot v. St. Farm Fire,* 165 F. 3d. 24 (5th Cir. 1998) (unpublished) [insert publication citation when available] and for reasons assigned by the district court in its thorough Order and Reasons of September 2, 1999, 1999 U.S. Dist. LEXIS 13800 [insert publication citation when available], we affirm the judgment of the district court.

AFFIRMED.

APPENDIX 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TIMOTHY K. DUNAWAY	CIVIL ACTION
VERSUS	NO. 98-2035
UNITED STATES OF AMERICA, ET AL.	SECTION "R"(4)

ORDER AND REASONS

(Filed Sept. 2, 1999)

Before the Court is defendant, United States' motion to dismiss this case for lack of subject matter jurisdiction, or alternatively for summary judgment. The United States claims it has not waived sovereign immunity for the conduct in issue. The Court agrees, and the defendant's motion for summary judgment is granted.

I. Background

On April 12, 1998, Timothy Dunaway ran aground on a sandbar that had formed in the Pearl River Navigational Canal.[1] The United States Army Corps of Engineers completed the canal in 1958, pursuant to the authorization conferred by the River and Harbor Act of 1935. It designed the waterway to provide a minimum depth of 7 feet for navigation from the mouth of the West Pearl River to the vicinity of Bogalusa, Louisiana. The waterway was constructed primarily to facilitate commercial

[1] Canal is referred to interchangeably as "waterway" and "project."

traffic, but commercial traffic declined significantly after 1964. In 1975, the Corps discontinued maintenance dredging for several years and placed the project in limited operational status with reduced funding and maintenance. Subsequently, the project sponsor requested that tests be performed regarding the feasibility of reopening the project. The results indicated that dredging was needed, and the United States dredged to reopen the waterway to commercial traffic on two occasions in 1988 and 1989.

In 1991, an Environmental Impact Statement was performed to assess the potential harm of dredged materials. A final EIS issued in 1994, and environmental litigation seeking declaratory and injunctive relief against dredging the waterway was filed in January of 1995. On May 25, 1995, the United States District Court for the Eastern District of Louisiana issued a preliminary injunction against dredging in order to prevent irreparable harm to the ecosystem. The same year, Congress restricted dredging funds and placed the project in caretaker status. It allocated funds ($280,000.00) for maintenance of the project in caretaker status and correction of safety problems at the project locks.

In March of 1998, the parties to the injunction proceeding submitted a stipulated order of dismissal, ending the injunction. Thus, the Corps was enjoined from dredging the waterway from late May 1995 to March 1998. In April of 1998, Dunaway was injured when his motorboat hit a submerged sandbar in the canal. On July 10, 1998, Dunaway sued the United States, alleging that the United States was negligent in failing to mark, warn of or remove the sandbar. Dunaway thereafter amended his

complaint to include the Sheriff of St. Tammany, Rodney Strain. Strain filed a cross-claim against the United States, alleging that the United States had a duty to maintain the canal and to warn of, mark, or remove obstructions such as the sandbar.

The United States now moves the court to dismiss the case against it for lack of subject matter jurisdiction. The United States contends that the claims challenge discretionary conduct for which it has not waived sovereign immunity. The United States moves in the alternative for summary judgment on the same grounds.

II. Discussion

The United States' motion shall be treated as one for summary judgment, because this court has considered matters outside the pleadings.

A. Summary Judgment Standard

Summary judgment is appropriate when there are no genuine issues as to any material facts, and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552 (1986). A court must be satisfied that no reasonable trier of fact could find for the nonmoving party or, in other words, "that the evidence favoring the nonmoving party is insufficient to enable a reasonable jury to return a verdict in her favor." *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 178 (5th Cir. 1990), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511 (1986). The moving party

bears the burden of establishing that there are no genuine issues of material fact.

If the dispositive issue is one for which the nonmoving party will bear the burden of proof at trial, the moving party may satisfy its burden by merely pointing out that the evidence in the record contains insufficient proof concerning an essential element of the nonmoving party's claim. *See Celotex*, 477 U.S. at 325, 106 S.Ct. at 2554; *see also Lavespere*, 910 F.2d at 178. The burden then shifts to the nonmoving party, who must, by submitting or referring to evidence, set out specific facts showing that a genuine issue exists. *See Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553.

B. Discretionary Function Exception to SAA

Generally, the United States is immune from suit unless it waives sovereign immunity. *See United States v. Sherwood*, 312 U.S. 584, 586 (1941). The Federal Tort Claims Act ("FTCA") was enacted in order to allow persons to sue the United States for injury, but it is subject to various exceptions such as the discretionary function exception. *See* 28 U.S.C. § 2680.[2] The discretionary function exception provides:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be

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[2] For a discussion of the legislative history surrounding the FTCA and the discretionary function exception, *see Dalehite v. United States*, 346 U.S. 15, 24-30, 73 S.Ct. 956, 962-65 (1953).

> valid, or based upon the exercise or performance *or the failure to exercise or perform* a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a), *emphasis added*. The exception thus eliminates any waiver of immunity from suit for acts that "involv[e] an element of judgment or choice[.]" which is grounded in economic, political or social policy. *United States v. Gaubert*, 499 U.S. 315, 322, 111 S.Ct. 1267, 1273 (1991), *quoting Berkovitz v. United States*, 486 U.S. 531, 536, 108 S.Ct. 1954, 1958 (1988). An inquiry into what falls under the discretionary function exception must focus on the *nature* of the act, rather than the status of the actor. *See United States v. Varig Airlines*, 467 U.S. 797, 813, 104 S.Ct. 2755, 2764 (1984). The requirement of judgment or choice is not satisfied, however, if a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," because the employee has no choice but to follow the course of action. *Berkovitz*, 486 U.S. at 536, 108 S.Ct. at 1958-9.

The Court must therefore employ a two-step inquiry to determine whether conduct falls within the discretionary function exception. The Court determines (1) whether the challenged conduct involves an element of judgment or choice; and, (2) whether the judgment at issue is the kind the discretionary function exception was designed to shield, that is, whether it is grounded in social, economic or political public policy. *See id., Varig*, 467 U.S. at 813, 104 S.Ct. at 2764; *ALX El Dorado, Inc. v. Southwest Savings & Loan Ass'n.*, 36 F.3d 409, 411 (5th Cir. 1994)

(laying out judgment and policy prongs of discretionary function inquiry). When a governmental policy such as a statute, guideline, or regulation allows an agent to exercise discretion, courts may presume that the agent's acts are grounded in policy in the exercise of that discretion. *See Gaubert*, 499 U.S. at 324, 111 S.Ct. at 1274. On the other hand, courts may conclude that the failure to act, although discretionary, is not "susceptible" to the policy considerations requisite to invoke the shield of the discretionary function exception. *Id.* at 325, 1275. The discretionary function exception was confected to protect only those judgments based on public policy, because its purpose is to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Varig*, 467 U.S. at 814, 104 S.Ct. at 2765; *see* Berkovitz, 486 U.S. at 537, 108 S.Ct. at 1959.

Although it is not expressly written into the Suits in Admiralty Act ("SAA"), 46 U.S.C.A. § 741, *et seq.*, under which this suit is filed, the Fifth Circuit has applied the discretionary function exception to the SAA. *See Baldassaro v. United States*, 64 F.3d 206, 208 (5th Cir. 1995); *Wiggins v. United States*, 799 F.2d 962 (5th Cir. 1986). Here, the relevant inquiry is whether the failure to act by the Corps of Engineers was protected by the discretionary function exception.

1. Element of Judgment or Choice

The Corps argues that the decision not to warn of, mark or remove the sandbar in the canal falls squarely within the discretionary function exception. The Corps

enjoys wide latitude, it asserts, in deciding whether and how to deal with submerged obstructions such as the sandbar at issue.

The United States does not ensure the safe navigation of any waterway. *See Canadian Pacific Ltd. v. United States*, 534 F.2d 1165 (5th Cir. 1976); *In re Lloyd's Leasing Ltd.*, 764 F.Supp. 1114, 1138 (S.D.Tex. 1990). Further, the United States has no duty to establish aids to navigation. *See Indian Towing v. United States*, 350 U.S 61, 69 (1955); *Tringali Bros. v. Unites* [sic] *States*, 630 F.2d 1089, 1090 (5th Cir. Unit A, 1980) (holding that although it is authorized to do so, Coast Guard has no statutory duty to place navigational aids in dangerous waterways).

Because the United States has no duty to ensure the safe navigation of any waterway, or to establish aids to navigation, it enjoys discretion as to whether and how it will establish such aids. *See Indian Towing*, 350 U.S. at 69; *Theriot v. United States*, Civ. No. 97-30982 (5th Cir. 1998)[3] (holding that Corps was immune from liability for decision not to warn of or mark underwater sill it constructed decades before boating accident); *Picou v. United States*, 1995 WL 232674 at *2 (E.D. La. Apr. 17, 1995) (holding that United States has discretion to determine whether it will undertake duty to mark, remove or warn of an obstruction to navigation). Decisions involving whether and how to warn, mark or remove obstructions such as the sandbar necessarily require the exercise of judgment or choice in selecting the location, number, size, type and

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[3] *Theriot* is an unpublished opinion with limited precedential value pursuant to 5th Cir. R. 47.5.4. Under this rule, however, unpublished opinions may be persuasive.

operational characteristics of maritime aids. *See Lawson v. United States*, 124 F.3d 198, 1997 WL 530540 at **3 (6th Cir. Aug. 27, 1997, (unpublished)) (holding that placement of navigational lights by its very nature requires judgment and discretion).

It is true that the discretionary function exception does not apply if the Corps (or its employee) failed to follow a specific, mandatory directive. *See Berkovitz*, 486 U.S. at 531, 108 S.Ct. at 1958. Dunaway and Strain fail, however, to point to any mandatory regulations governing the Corps' marking or removal of sandbars.

(a) Congressional Authority and Conference Report

Strain submits that the Corps failed to maintain a channel of 7 feet deep by 80 to 100 feet wide "as Congress originally required." (Strain's Mot. Opp'n. at 5.) This assertion ignores the fact that beginning in 1995, and for several years, the Corps was specifically enjoined from dredging the canal. In addition, despite any original authorization by Congress, Congress placed the waterway in caretaker status in 1995, at which time it allocated a fixed sum of money ($280,000.00) with which the Corps was charged to do maintenance and correct safety problems at the project's locks. (*See* Pl.'s Opp'n. Ex. 9 (Conference Report 104-293).) The Conference Report lists no specific course of action, priority, or definition of "maintenance" or "safety problems." That the Corps was enjoined from dredging for three years before this accident, and that it had a limited budget (and no statutory directives) with which to do maintenance and make

safety corrections to the project evidence the necessity of judgment and choice in making these decisions. *Cf. Lincoln v. Vigil*, 508 U.S. 182, 183, 113 S.Ct. 2024, 2026 (1993) ("when Congress merely appropriates lump-sum amounts without statutory restriction, clear inference may be drawn that it does not intend to impose legally binding restrictions [on their use], and indicia in committee reports . . . [indicating] how the funds should, or are expected to[ ] be spent do not establish any legal requirements on the [federal] agency"); *Seabeam Instruments, Inc.*, 1992 WL 175870 (C.G.) (Jul. 20, 1992) (same). Furthermore, Chapter 8 of ER 1130-20-520 provides that "authorized navigation projects will be maintained to full . . . channel dimensions when feasible and justified," and the justification must reflect the current level of navigational activity and budgetary constraints. ER 1130-2-520 § 8-2(a)(2)(5). The Corps' decision whether maintenance of the original channel dimensions was "feasible and justified" clearly involves judgment, the essence of discretion.

In *Theriot, supra*, the Fifth Circuit rejected a similar argument by plaintiffs who were injured while fishing in the Mississippi River. The plaintiffs' boat struck a sill that the Corps had constructed in 1959, which was originally tied into the banks by earthen levees that were visible above water. Subsequently, the entire sill became submerged as a result of erosion, but the Corps decided not to mark or warn of the obstruction. The injured parties in *Theriot* alleged that the Corps failed to maintain the sill in its original condition and that this conduct was unprotected by the discretionary function exception. *See id.* at 7. In support of their argument, the appellants in

Theriot cited *Indian Towing, supra; Denham v. United States,* 834 F.2d 518, 520-21) (5th Cir. 1987) (holding that decision to establish recreational swimming area was discretionary, but failure to replace buoy that had been secured by anchor was outside protection of discretionary function exception); *Sheridan Transportation Co. v. United States,* 834 F.2d 467, 473 (5th Cir. 1987) (recognizing that initial decision to place buoy 60 feet from wreck was discretionary function, but moving buoy 250 away from wreck without warning the public was not protected by discretionary function exception). The Fifth Circuit distinguished these cases and rejected this argument. *See Theriot, supra,* at 8-9. It held that the cases cited by the appellants involved the government's failure to *maintain certain navigational aids* it had installed, such as lighthouses and buoys, not its failure to maintain structures it owned or constructed such as the sill. *See id.* The court concluded that a different result would issue had the Corps first decided to physically mark the location of the sill, and then negligently carried out that decision. *See id.* Here, as in *Theriot,* the Corps never marked the sandbar at issue. Had it undertaken to warn of the obstruction, and then negligently carried out this decision, cases such as *Indian Towing, Denham,* and *Sheridan* would guide the result. This is not the case, however. Furthermore, the sandbar was not constructed by the Corps. Strain argues that the Corps nevertheless created the sandbar, because it arose only when the Corps created the canal. Even if the Court accepted this argument, it would still find that the discretionary function exception applies because the Fifth Circuit has found that the exception applies even when the

Corps has intentionally constructed the obstruction. *See Theriot, supra.*

(b) ER 1130-2-520

Strain contends that the Corps had a nondiscretionary duty to warn the public and to notify the Coast Guard of the sandbar under ER 1130-2-520. This regulation, entitled "Aids to Navigation, Navigation Charts, and Related Data," states:

> Applicable elements shall cooperate in the communication of navigation-related information of specific interest to the recreational and commercial marine industries, user and other related government entities. [. . .]
>
> *MSC/district commanders* shall furnish to the U.S. Coat Guard (USCG) district commanders, for their immediate information, any facts which may come to their attention in connection with their duties which shall be of benefit to the USCG *in maintaining its system of aids to navigation.* [. . .]

ER 1130-2-520, *emphasis added to show language omitted by Strain.* Neither paragraph establishes a fixed standard mandating that the Corps issue public warnings about sandbars. The first paragraph is merely a directive to "[a]pplicable elements" to cooperate. The second paragraph refers to "*maintaining* [the Coast Guard's] system of aids to navigation[,]" which suggests that this regulation deals with *existing* navigational aids and charts. Furthermore, the words "which shall be of benefit to the USCG" in the second paragraph require judgment in deciding what information to report. Finally, for Strain's

argument to matter, he would have to show that the Coast Guard, if notified, would have had a duty to mark or remove the sandbar. Strain has established no such duty.

(c) Memorandum of Agreement

Strain also argues that a Memorandum of Agreement ("MOA") between the Corps and the USCG established a nondiscretionary duty on the Corps to report possible hazards to the Coast Guard. This internal regulation provides guidelines as to which agency does what in assessing an obstruction. It establishes a range of possible actions to take and a nonexclusive list of factors to consider in deciding what to do about an obstruction. *See* Strain's Opp'n. Ex. D at B. The Corps correctly points out that reliance on an identical MOA was rejected in *Theriot*. See *Theriot, supra* at 11.

In *Theriot*, the Fifth Circuit concluded that the MOA applied only to privately owned structures. *See id.* The MOA contained "[n]umerous references to the 'owner' of an obstruction or a sunken vessel." *Id.* For example, the MOA referred to the Coast Guard's authority to mark obstructions if the owner cannot be identified or fails to adequately mark the obstruction. *Id.* at 14. The Court therefore concluded that the "logical reading is that the referenced owner is a private third party other than the Corps, the Coast Guard, or any other government agency." *Id.*

The Fifth Circuit also reasoned that even if the MOA applied to the government-owned sill, the MOA did not mandate any specific corrective action. Rather, the MOA

lists nonexclusive factors to consider in determining whether an obstruction is a hazard to navigation and in determining what to do about it if it is. *See id.* at 13-14. The decision whether an obstruction is a hazard to navigation involves the use of the agencies' collective judgment in considering the factors listed.[4] Once the Corps and the Coast Guard decide that an object is a hazard to navigation, the MOA lists alternative courses of action that they may follow, which include doing nothing. These alternatives are: (1) no action; (2) charting; (3) broadcasting and publication of navigational safety information;

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[4] Those factors are:

(1) Degree to which obstruction restricts, endangers, or interferes with the navigability of a body of water.

(a) Location with respect to navigational traffic patterns.

(b) Navigational difficulty at site of obstruction.

(c) Clearance of depth of water over obstruction.

(d) Fluctuation of water level and other hydraulic characteristics.

(2) Physical characteristics of obstruction, including cargo (if any).

(3) Possible movement of obstruction.

(4) Marine activity in vicinity of obstruction.

(a) Type of commercial and recreational vessel traffic.

(b) Density of commercial and recreational vessel traffic.

(c) Trends of waterway use.

(5) Location of obstruction with respect to existing aids to navigation.

(6) Prevailing and historical weather conditions.

(7) Length of time obstruction has existed.

(8) History of vessel accidents involving obstruction.

(Strain's Mot. Opp'n. Ex. D at B-4.)

(4) marking; (5) redefinition of navigational area; (6) removal; and (7) combination of above. Thus, even if the Corps had reported the sandbar to the Coast Guard, the MOA did not impose a nondiscretionary duty on either the Corps or the Coast Guard to mark or remove the sandbar.

(d) 36 C.F.R. § 327.1

Even less persuasive is Strain's contention that 36 C.F.R. § 327.1 prescribes specific behavior with which the Corps' employee failed to comply. This regulation merely states that it is the Corps' policy to "manage the natural, cultural, and developed resources of each project in the public interest, providing the public with safe and healthful recreational opportunities . . . " 36 C.F.R. § 327.1. Strain points to nothing indicating that this regulation applies to the waterway at issue, and the language of the regulation is devoid of specific directives prescribing the behavior of the Corps or its employees. *See, e.g., Baum v. United States*, 986 F.2d 716, 722 (4th Cir. 1991) (holding that language requiring agency to provide a safe approach for passenger-vehicle traffic cannot be interpreted as a mandatory directive under *Gaubert* or *Berkovitz*, and did not remove all safety-related decisions from agency's discretion).

(e) 36 C.F.R. § 330.5(a)

Dunaway similarly contends that 36 C.F.R. § 330.5(a) prescribes a course of action for the Corps and its lock and dam operator, Kenneth Parker. This section states that "[i]t is the policy of the Corps to provide, to the

extent of its authorities, a safe and healthful environment for public use of lands and waters at Civil Works water resource development projects." 36 C.F.R. § 330.5(a). This section deals with "Regulation of Law Enforcement Services Contracts at Civil Works Water Resource Projects Administered by the Corps of Engineers" and does not address any Corps policy regarding how to deal with sandbars. *See* 36 C.F.R. § 330. Rather, it deals with contracts for law enforcement services, and the canal project at issue is devoid of such a contract. Even if § 330 did apply to the canal project, the language "to the extent of its authorities" indicates that the Corps must exercise judgment in carrying out the policy expressed in the regulation.

(f) 33 C.F.R. § 245

Along the same lines, Dunaway cites 33 C.F.R. § 245, entitled "Removal of Wrecks and Other Obstructions." This describes the Corps' authority for "wreck removal." 33 C.F.R. § 245.1. This authority is limited by ER and EP 1130-2-520, which specifically state that they do not apply to obstructions other than vessels.[5] Moreover, even if § 245 applied to sandbars, it does not establish mandatory corrective action. *See* 33 C.F.R. § 245.25 (listing

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[5] Under ER 1130-2-520, *Navigation and Dredging Operations and Maintenance Policies*, the Corps' authority to remove wrecks or other obstructions is limited to removal of vessels, and does not "includ[e] objects such as trucks, train cars, boulders, or debris." ER 1130-2-520 at ¶¶ 4-2, 4-3(b). *See also* EP 1130-2-520 at ¶ 4-2.

marking, removal, or redefinition of a waterway as examples of action that may be considered).

(g) EP 1130-2-550

Dunaway also asserts that EP 1130-2-550 prescribes a specific course of action which the Corps violated. This policy provides that the "Corps integrates management of diverse natural resource components such as fish, wildlife, forests, wetlands, grasslands, soil, air and water with the provision of public recreation opportunities. The Corps conserves natural resources and provides recreation opportunities that contribute to the quality of American life." EP 1130-2-550. A stated objective of this policy is to provide "a quality outdoor recreation experience which includes an amenable, safe and healthful environment." *Id.* Although the Corps disputes whether this policy even applies to the project at issue, the Court finds that even if it does, there is nothing in this general policy statement that prescribes a mandatory course of action with respect to marking sandbars.

(h) Parker's Knowledge and Job Description

Strain also argues that there is a material issue of fact as to whether the Corps' employee Kenneth Parker knew of the sandbar prior to plaintiff's accident. An analysis of prior knowledge, however, is unhelpful in the present case, because the Fifth Circuit has found that the Corps' acts or omissions may be protected even when it created and knew of the obstruction. *See, e.g., Wiggins*, 799 F.2d at 963 (explaining that Coast Guard and Corps knew of pilings in lake involved in accident, and holding agency

decision that use of government funds to remove them was unjustifiable was protected by discretionary function exception); *Theriot, supra* (holding that United States was immune from suit regarding collision with sill constructed by government); *cf. Mestayer v. United States,* 1995 WL 405711 at *4 (E.D. La. Jul. 7, 1995) (holding that United States' failure to light warning signs at night on sill it constructed fell within discretionary function exception).

Dunaway and Strain aver that Parker's job description amounts to a mandatory directive that removes his conduct from the ambit of the discretionary function exception. Parker, they assert, had no discretion in the performance of his duties; thus his failure to notify the Corps and the USCG so that they might determine whether and how to respond to the sandbar is unprotected behavior.

The Court observes first that an internal government job description does not have the force of a statute or a regulation. The Court doubts that parker's internal job description can, without more, establish an actionable duty to the public or remove discretion from his employing agency over matters otherwise committed to it. *See Zabala Clemente v. United States,* 567 F.2d 1140, 1145 (1st Cir. 1977) (even assuming FAA surveillance order was mandatory, it did not give rise to legal obligation under FTCA, because employee's duty to comply with directive is different from duty owed by government to public);[6] *cf.*

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[6] *Zabala* did not discuss the discretionary function exception, and courts have not directly addressed the issue of

In re American Oil Co., 417 F.2d 164, 170 (5th Cir. 1969) (USCG's search and rescue plan imposed no duty on the government to public); *Tringali*, 630 F.3d at 1093 (failure to live up to internal regulations did not amount to negligence *per se*).

Furthermore, Parker's job description does not establish nondiscretionary duties with respect to the sandbar. His duties included:

> furnishing information to public on project resources and facilities . . . conducting water patrols and inspections of the lateral canal which connects the locks and dams to determine channel maintenance requirements such as snagging and removal of drift accumulation . . .

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whether an internal job description, if mandatory, can have sufficient force to remove challenged activity from the ambit of an agency's discretion. Like *Zabala*, a number of courts have jumped to the bottom line issue of whether a tort duty exists and have held that mandatory internal regulations or administrative directives, while undisputably binding on government personnel, fail to create actionable duties to accident victims. *See, e.g., Tiffany v. United States*, 931 F.2d 271, 280 (4th Cir. 1991) (rejecting plaintiff's argument that mandatory internal directive created duty to civilians killed in air crash), *citing Zabala, supra*, and *In re Korean Air Lines Disaster of September 1, 1983*, 646 F.Supp. 30 (D.D.C. 1986). The *Tiffany* court reasoned that holding otherwise "could only result in increased confusion and a loss of . . . efficiency" and that no "worthwhile goals" would be achieved "if [the agency] were to state in boilerplate throughout its regulations that the rules are not meant to create tort duties, or if [the agency] responded by promulgating regulations of a most permissive nature, designed to retain maximal flexibility." *Tiffany*, 931 F.2d at 281.

> monitors project signs and navigation aids, taking appropriate action to insure replacement of damaged or destroyed signs and buoys.

(Pl.'s Mot. Opp'n. Ex. Norris 4 at 102.) The description confers considerable discretion on Parker because he

> determines priority of work to be accomplished at the facilities . . . [u]ses judgment in paying particular attention to areas, activities, or time/day situations that are likely problem periods or sources . . . [and] [i]ndependently plans and accomplishes work in accordance with general directives.

(*Id.* at 1-3.) Parker's job description merely outlines his major responsibilities, and the day-to-day decisions involved in carrying out these duties requires the exercise of judgment or choice. Parker's duties, including conducting water patrols and inspections of the canal, nowhere prescribe the frequency, location, or method of inspection. Nor do his duties authorize him to initiate dredging. Further, Parker's job duties do not involve deciding where to place *new* navigation aids or markers; rather, he is charged only with maintaining *existing* signs and buoys. In short, Parker's job description is insufficient to nullify the applicability of the discretionary function exception. The Corps retains discretion as to whether, when and in what manner to deal with an obstruction such as a sandbar. *Cf. Canadian Pacific*, 534 F.2d at 1170 (holding that Corps is under no duty to survey or dredge river in any particular time or place).

In summary, an analysis of the Conference Report, regulations, MOA, and Parker's job description reveals that the failure to report, warn of, mark, or remove the

sandbar is shielded by the discretionary function exception.

2. Grounded In Policy

The discretionary decision concerning the handling of sandbars is susceptible to social and economic policy considerations, including the needs of society and maritime commerce, and the efficient use of federal funds. As the Corps notes, the decision to mark the sandbar, dredge the canal, or do nothing involves considerations of the amount of commercial traffic on the waterway relative to the potential expense of dealing with the sandbar. Further, undertaking to mark the sandbar would involve costs and would expose the United States to further liability under the "failure to maintain" or "supplied a service" arguments that have prevailed in discretionary function cases. *See, e.g., Indian Towing, supra.*

Courts in this circuit and others have found that the United States has satisfied both prongs of the discretionary function exception inquiry on similar facts. *See Theriot, supra* (affirming lower court's holding that decision whether to warn requires exercise of policy judgment); *Mestayer,* 1995 WL 405711 at *4 (holding that decisions concerning the installation of warning devices are covered by the discretionary function exception); *Kiehn v. United States,* 984 F.2d 1100, 1103 (10th Cir. 1993) (holding that whether to post warning signs is clearly discretionary); *Bowman v. United States,* 848 F.Supp. 979, 986 (M.D. Fla. 1994) (stating that decision not to warn of government-created hazard fell within discretionary function exception). Any failure by the Corps or its

employee to report, warn of, mark, or remove the sandbar is thus susceptible to policy analysis and satisfied the second prong of the discretionary function inquiry.

III. Conclusion

For the foregoing reasons, the United States' motion for summary judgment is granted.

New Orleans, Louisiana, this 2nd day of September, 1999.

/s/ Sarah Vance
SARAH S. VANCE
UNITED STATES
DISTRICT JUDGE

APPENDIX 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-31095

TIMOTHY K DUNAWAY

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA; ET AL

Defendants

UNITED STATES OF AMERICA

Defendant - Appellee

v.

RODNEY STRAIN

Defendant - Appellant

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING

(Filed Jun. 5, 2001)

Before REYNALDO G. GARZA, DAVIS, and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.